BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL S. JENKINS	)	
Claimant	)	
VS.	)	
	)	Docket No. **1,054,337**
VANCE BROTHERS, INC.	)	
Respondent	)	
AND	)	
	)	
MISSOURI EMPLOYERS MUTUAL	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requests review of the December 1, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Bruce L. Wendel of Leawood, Kansas, appeared for claimant. Heather E. Hutsell of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of preliminary hearing dated November 29, 2011, with exhibits; the deposition of John Yeldell dated November 21, 2011, with exhibits; the deposition of Eddie G. Swindler dated November 21, 2011; and all pleadings contained in the administrative file.[1]

ISSUES

The ALJ found that the last act necessary for the formation of claimant's employment contract occurred in Missouri and that his claim accordingly is not covered by the Kansas Workers Compensation Act.[2]

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[1] Claimant's brief to the Board indicates that the record includes a deposition of claimant dated April 6, 2011. However, there is no such deposition transcript in the administrative file and neither respondent's counsel nor the ALJ refer to claimant's deposition as being a part of the record. The Board will consider only the record detailed by the ALJ in the preliminary order.

[2] There is no dispute that claimant's accidental injury occurred in Missouri and that claimant's principal place of employment is in Missouri.

Claimant raises the following issues on review: (1) whether the ALJ erred in finding that claimant's employment contract was formed in Missouri; and, (2) whether the ALJ erred in finding that Kansas lacks jurisdiction in this claim.

Respondent argues that the contract of employment was formed either in a telephone conversation between Mr. Swindler and claimant or when claimant completed the physical examination and drug testing which was required before he began work for respondent. Under either scenario respondent contends the last act necessary to form the contract occurred in Missouri and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT[3]

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on December 22, 2009.

He commenced employment with respondent in November 2008. He left respondent's employ on February 20, 2009, in order to work for another employer in Wyoming. Before claimant returned to Kansas City, Missouri, in July 2009, he inquired of Eddie Swindler, the plant manager for respondent, by both email and telephone conference, regarding the prospects of his returning to work for respondent. Mr. Swindler told claimant he would make room for him. Mr. Swindler also told claimant to contact him when he returned to Kansas City, Missouri.

The record appears to document three telephone conferences between claimant and Mr. Swindler after claimant's return to Kansas City, Missouri, from Wyoming. The first two were initiated by claimant and the third by Mr. Swindler. All three telephone conversations concerned claimant's return to work for respondent.

In the first telephone conference claimant told Mr. Swindler that he was not yet ready to return to work because he "had some things he needed to take care of."[4] Mr. Swindler told claimant to let him know when he was ready to work.

The second telephone conversation evidently occurred in September 2009. In that telephone conference claimant and Mr. Swindler discussed wages. Mr. Swindler told

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[3] The findings of fact make reference to only that evidence which is material to the issue of Kansas coverage.

[4] P.H. Trans. at 29.

claimant he could return to work for respondent earning the same wage he earned before his departure. Claimant asked for a one dollar per hour raise.[5] Mr. Swindler responded that he had to get authority from his boss before he could agree to the one dollar raise.

In the third telephone conversation, which also occurred in September 2009, Mr. Swindler agreed to claimant's proposal to return to work with the requested raise. In this telephone conference, as well as the second, claimant was located at his home in Shawnee, Kansas, and Mr. Swindler was at respondent's office in Kansas City, Missouri. Mr. Swindler testified briefly at the preliminary hearing and confirmed the accuracy of claimant's testimony about the circumstances surrounding respondent's rehiring of claimant. However, Mr. Swindler testified he believes he told claimant that his rehiring was contingent on claimant passing a physical examination and a drug screen.

John Yeldell, respondent's human resource director, testified that claimant began his second tenure of employment on October 8, 2009. Mr. Yeldell testified that claimant was required to take a pre-employment drug screen and undergo a physical examination. Mr. Yeldell testified:

> Q. And what happens if they do not pass a drug screen and physical?
>
> A. They are -- there is communication, they are told that the contingent offer of employment is rescinded.[6]

Mr. Yeldell testified that claimant would have been considered an employee of respondent when he successfully completed the drug screen and physical.

The drug screen and physical examination occurred in Missouri on October 6, 2009, and October 8, 2009, respectively.

PRINCIPLES OF LAW

A claimant in a workers compensation claim has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[7]

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[5] *Id.* at 20, 29.

[6] Yeldell Depo. at 7.

[7] K.S.A. 2009 Supp. 44-501(a); K.S.A. 2009 Supp. 44-508(g); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 278-79, 826 P.2d 520 (1991).

> The workers compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: . . . [8]

In *Shehane*,[9] the Kansas Court of Appeals held:

> The basic principle is that a contract is "made" when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

ANALYSIS

Clearly, no contract of employment was formed in the first two telephone conversations between claimant and Mr. Swindler following claimant's return to Kansas City, Missouri. No party contends otherwise. The preponderance of the credible evidence establishes that in the second conversation claimant made an offer of employment. In that second conference, claimant proposed that he return to work for respondent and receive one dollar per hour more than claimant earned before he quit working for respondent. Mr. Swindler did not have authority to agree to the raise. Mr. Swindler told claimant that he would have to get authority from his boss before agreeing to claimant's offer. Mr. Swindler thereafter talked to his boss and obtained authority to agree to claimant's offer. Mr. Swindler then called claimant and accepted claimant's offer. The acceptance of the offer by respondent occurred in Missouri, where Mr. Swindler was located when he accepted the offer. That acceptance constituted the last act necessary to the formation of a contract of employment between claimant and respondent.

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[8] K.S.A. 44-506.

[9] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

[10] K.S.A. 44-534a.

[11] K.S.A. 2010 Supp. 44-555c(k).

Accordingly, this Board Member finds that the ALJ correctly determined that the contract of employment between claimant and respondent was formed in Missouri and that this claim does not fall within the jurisdiction of the Kansas Workers Compensation Act. The respondent's contention that the physical examination and drug screen, both of which took place in Missouri, were conditions precedent to the formulation of the contract, need not be addressed.[12]

CONCLUSION

WHEREFORE, the undersigned Board Member affirms the December 1, 2011, preliminary hearing Order entered by ALJ Steven J. Howard.

IT IS SO ORDERED.

Dated this ____ day of February, 2012.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Bruce L. Wendel, Attorney for Claimant
Heather E. Hutsell, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[12] See *Speer v. Sammons Trucking*, 35 Kan. App. 2d 132, 128 P.3d 984 (2006); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).